QUESTION PRESENTED

Whether Congress waived the federal government's sovereign immunity against money damages for violations of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.*, which prohibits discrimination on the basis of disability in "any program or activity conducted by any Executive agency." 29 U.S.C. 794(a) (Supp. V 1993).

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-365

JAMES GRIFFIN LANE, PETITIONER

v.

FEDERICO F. PEÑA, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not reported. The district court opinion on the issue of petitioner's entitlement to damages (Pet. App. 5a-7a) is not reported.

JURISDICTION

The decision of the court of appeals was entered on June 5, 1995. The petition for a writ of certiorari was filed on September 5, 1995 (the day after a legal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. This suit arises from petitioner's discharge from the Merchant Marine Academy in December of 1992. The United States Merchant Marine Academy (MMA) is a federal service academy that trains men and women to serve as commercial merchant marine officers and as commissioned officers in the United States armed forces. The MMA is administered by the Maritime Administration, a unit within the Department of Transportation. Pet. App. 15a & n.3.

Petitioner applied for an appointment to the MMA in 1990. After passing a physical examination administered by the Department of Defense and meeting the MMA's other requirements for appointment, petitioner entered the Academy in July, 1991. Pet. App. 15a-16a. Subsequent to his entry to the Academy, a private physician diagnosed petitioner as having diabetes mellitus. *Id.* at 16a. After a hearing before the MMA's Physical Examination Review Board confirming petitioner's condition, the Academy Superintendent notified petitioner that he would be separated from the MMA at the end of the semester, in December 1992. *Id.* at 18a. The Superintendent advised Lane that diabetes disqualified him for military service, thus rendered him ineligible to be commissioned for service in the Navy/Merchant Marine Reserve Program, and required his discharge from the Academy. *Id.* at 17a, 18a.

b. Petitioner filed suit in the United States District Court for the District of Columbia, contending that his dismissal from the Academy violated the Maritime Education and Training Act of 1980 (META), 46 U.S.C. App. 1295 *et seq.*, and Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C.

794(a) (Supp. V 1993). Pet. App. 12a. He sought immediate reinstatement to the Academy and compensatory damages, including out-of-pocket expenses, loss of professional opportunity, pain and suffering, attorneys' fees, and costs. *Ibid.* On October 26, 1994, the district court granted summary judgment, entered judgment for petitioner, and ordered his immediate reinstatement to the Academy. *Id.* at 11a-61a. Petitioner re-enrolled at the Academy and resumed his studies. Pet. 5 & n.5.

The district court initially ruled that petitioner also was entitled to compensatory damages under Section 504 of the Rehabilitation Act. See Pet. App. 11a-61a. On December 16, 1994, however, the D.C. Circuit ruled in *Dorsey* v. *United States Dep't of Labor*, 41 F.3d 1551 (1994), that the Rehabilitation Act did not waive the federal government's sovereign immunity against money damages for violations of Section 504 of the Act. The court of appeals held that, under this Court's sovereign immunity jurisprudence, see *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992), such waivers must be explicit and unambiguous. See 41 F.3d at 1554-1555. The court found no such explicit language in either Section 504 or Section 505 of the Rehabilitation Act. *Ibid.* The court noted that Section 505 explicitly incorporates the remedies of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, for violations of Section 504, 41 F.3d at 1554, but it found no explicit waiver of sovereign immunity against money damages in Title VI. 41 F.3d at 1555. The court of appeals emphasized that the fact "[t]hat damages may be recovered against private parties does not * * * lead to the conclusion that damages may also be recovered against the government. When it comes to monetary

relief, sovereign immunity puts the federal government on a different footing [from] private parties." 41 F.3d at 1555. In examining the legislative history of Section 504, the court of appeals found it "at the very best * * * ambiguous." *Ibid.* The court expressly recognized that its decision respecting liability for damages for violations of Section 504 was in conflict with the Ninth Circuit's contrary decision in *Doe* v. *Attorney General of United States*, 941 F.2d 780 (1991). 41 F.3d at 1555.[1]

In light of *Dorsey*, the district court vacated its prior ruling and held that petitioner is not entitled to monetary damages. Pet. App. 5a-7a.

2. The court of appeals summarily affirmed. Pet. App. 1a-2a.

DISCUSSION

The decision of the court of appeals, although correct, conflicts with decisions of the Court of Appeals for the Ninth Circuit on the question whether Congress has waived the federal government's sovereign immunity against money damages for violations of Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. 794(a) (Supp. V 1993). The availability of money damages against the federal government for violations of Section 504 is a question of substantial

[1] In *Dorsey*, the court of appeals noted that neither Section 504 nor Title VI expressly provides for a right of action for compensatory damages. 41 F.3d at 1554. The Ninth Circuit in *Doe* v. *Attorney General of United States*, 941 F.2d 780 (1991), held that an implied cause of action exists for damages for violations of Section 504. The *Dorsey* court did not find a need to resolve that issue because it concluded that "[e]ven if there is an implied right of action for damages under Title VI, and thus under § 504, it cannot exist as against the federal government." 41 F.3d at 1554-1555.

importance to the United States and is a matter on which there should be uniformity in the lower courts. Accordingly, the United States agrees with petitioner that plenary review by this Court is warranted.

1. The decision of the court of appeals in this case is a summary affirmance of the district court ruling based on the earlier decision in *Dorsey* v. *United States Dep't of Labor*, 41 F.3d 1551 (D.C. Cir. 1994). In *Dorsey*, the court held that Congress did not waive the federal government's sovereign immunity against money damages for violations of Section 504 of the Rehabilitation Act. That ruling conflicts with the Ninth Circuit's rulings in *Doe* v. *Attorney General of United States*, 941 F.2d 780 (9th Cir. 1991), and *J.L.* v. *Social Security Admin.*, 971 F.2d 260 (9th Cir. 1992).

2. The *Dorsey* decision and the summary affirmance by the court of appeals in this case are correct. It is well settled that waivers of sovereign immunity must be unequivocally expressed and not implied. *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986); *Lehman* v. *Nakshian*, 453 U.S. 156 (1981); *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983); see also *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242-243 (1985). This Court recently reaffirmed that waivers of sovereign immunity must not be enlarged beyond what the statutory language requires, and that, for money damages to be available, waiver must unambiguously extend to monetary claims as well. *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992). Nor can the legislative history of a statute supply an unequivocal waiver that does not exist in the statute itself—"the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text." *Ibid.*

The court of appeals correctly ruled in *Dorsey* that Congress did not explicitly waive the federal government's sovereign immunity against money damages for violations of Section 504 of the Rehabilitation Act. Section 504(a) of the Act bars federal aid recipients and federal executive agencies from discriminating on the basis of disability in programs and activities. Section 504(a) provides, in relevant part, that:

> [n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. 794(a) (Supp. V 1993).

Section 505(a)(2) of the Act specifies the remedies available for violations of Section 504. It provides that

> [t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title [section 504 of the Act].

29 U.S.C. 794a(a)(2).

Title VI of the Civil Rights Act of 1964 prohibits programs receiving federal financial assistance from discriminating on the basis of race, color or national

origin. 42 U.S.C. 2000d.[2] Title VI contains no provision specifying remedies against recipients of federal financial assistance who engage in discrimination other than in Section 2000d-7, which was enacted in 1986 to waive the States' Eleventh Amendment immunity. See pp. 9-10, *infra*. That Section provides that remedies in suits against States are available to the same extent as available against any public or private entities. The remedial provisions of Title VI generally deal with the authority and responsibilities of federal agencies that extend financial assistance to enforce Title VI.

The court of appeals correctly found that neither the Rehabilitation Act nor Title VI contains an explicit waiver of the federal government's sovereign immunity against money damages for violations of Section 504. In the remedies provision of Section 505(a)(2), Congress did not refer to persons aggrieved by acts of executive agencies. The absence of an express waiver for money damages for violations of Section 504 by executive agencies is especially obvious in light of the remedies provided for violations of Section 501 of the Act, 29 U.S.C. 791 (Supp. V 1993). Section 501 governs the federal government's liability for employment discrimination based on disability. See, *e.g.*, *Johnston* v. *Horne*, 875 F.2d 1415, 1418-1420 (9th Cir. 1989). With respect to violations of Section

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[2] Title VI provides, in relevant part:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. 2000d.

501, Section 505(a)(1) of the Act provides that any aggrieved employee or applicant for employment is entitled to the remedies, rights, and procedures provided by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16 (Supp. V 1993). 29 U.S.C. 794a(a)(1). Prior to 1991, Title VII did not authorize any awards of compensatory damages. In 1991, however, Congress enacted the Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072, which provides that compensatory damages are available for unlawful intentional discrimination with respect to employment practices under Title VII and the Rehabilitation Act, 29 U.S.C. 794a(a)(1). 42 U.S.C. 1981a(a)(1) and (2) (Supp. V 1993). In the 1991 Act, Congress thus for the first time waived immunity for compensatory damages for intentional discrimination in violation of Section 501. No similar waiver has ever been enacted with respect to Section 504.

Petitioner argues (Pet. 18-19) that Congress meant to put the United States on an equal footing with private defendants who violate Section 504. The fact that compensatory damages may be available against private or state defendants for violations of Section 504, however, cannot supply the unequivocal waiver of the federal government's immunity against such damages required by this Court's precedents.

Petitioner relies (Pet. 19) on one Senator's comments fourteen years after the enactment of the 1978 amendment that added executive agencies to Section 504's coverage. Legislative history, however, cannot supply the requisite unambiguous statutory waiver. See *Nordic Village, Inc.*, 503 U.S. at 37. In addition, the contemporaneous legislative history of the 1978 amendments "utter[s] not a word about

relinquishing the government's immunity from damages." *Dorsey*, 41 F.3d at 1555.

Petitioner's reliance (Pet. 20-22) on this Court's decision in *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992), and earlier cases is misplaced. In *Franklin*, the Court held that, in a case where a cause of action against private parties and local counties was implied under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, a court may award any appropriate relief. *Franklin* did not address the federal government's sovereign immunity against awards of money damages. In *Bell* v. *Hood*, 327 U.S. 678 (1946), also relied upon by petitioner, the Court held that the district court had jurisdiction over that suit, which claimed an entitlement to money damages for alleged unconstitutional actions by federal officers, but the Court did not rule on the merits of the issue. 327 U.S. at 684. Nor does the Court's ruling in *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), conflict with the requirement of an unambiguous waiver. In that case, Congress had authorized government payment to mail carriers; the Court held that the court of appeals had jurisdiction to issue a writ of mandamus for that ministerial act. 37 U.S. (12 Pet.) at 609-610.

Contrary to petitioner's contention (Pet. 19-20), the 1986 amendments to the Rehabilitation Act do not supply an unequivocal waiver of sovereign immunity. In 42 U.S.C. 2000d-7(a)(1) and (2), Congress waived the States' immunity under the Eleventh Amendment to liability for violations of Section 504, making available remedies against States "to the same extent as such remedies are available * * * against any public or private entity other than a State." 42 U.S.C. 2000d-7(a)(2). That waiver of state immunity has no rele-

vance to the federal government's immunity. Indeed, Congress's 1991 waiver of sovereign immunity for compensatory damages for intentional discrimination violating Section 501 of the Rehabilitation Act would have been superfluous if a waiver for damages had already existed under the 1986 amendments. See 42 U.S.C. 1981a(a)(2) (Supp. V 1993).

Finally, petitioner asserts (Pet. 16-17) that victims of discrimination are entitled to full redress for their injuries and that money damages are necessary to deter future statutory violations. But, "[w]hen it comes to monetary relief, sovereign immunity puts the federal government on a different footing [from] private parties." *Dorsey*, 41 F.3d at 1555. It is up to Congress to determine the remedies it wishes to authorize against the federal government in particular statutory schemes.

3. The issue of whether Congress has waived the federal government's immunity against money damages for violations of Section 504 of the Rehabilitation Act is a question of substantial importance to the United States, as well as to victims of discrimination in violation of Section 504. This question should be resolved uniformly under the federal statutory scheme regardless of the jurisdiction in which suit is brought. Review by this Court to resolve the existing conflict among the circuits is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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